Supreme Court, U.S.
FILED

No. 02 - 31 APR - 3 2002

OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

RICHARD C. HERBST – PETITIONER

vs.

MICHAEL A. O. BROWN – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD C. HERBST

931 VILLAGE BLVD, STE 905-122

WEST PALM BEACH, FL, 33409

561-792-7138

37 pg

QUESTIONS PRESENTED

1. Whether the U.S. District Court erred in applying a double standard in its consideration and application of its court rules.?

2. Whether the U.S. District Court erred in relaxing its standards for a defendant attorney while applying more stringent standards for a Pro Se non-attorney plaintiff?

3. Whether the U.S. District Court erred in its failure to issue a court order subpoena to the U. S. Department of Justice after the U. S. Department of Justice failed to react to three previous administrative requests by the Pro Se petitioner.

4. Whether the U.S. District Court erred in violating settled law that a pro se litigant be held to less stringent standards than formal proceedings by lawyers.

PARTIES TO PROCEEDINGS

Names of parties appear on cover of this booklet.

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TABLE OF AUTHORITIES

1. Federal Rules of Civil Procedure rule 61. P.8

2. HAINES v. KERNER ET AL. 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 P.8

3. ESTELLE CORRECTIONS DIRECTOR, ET AL v. GAMBLE 29 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 P.8

4. WILLIAM MCNEIL, PETITIONER v. UNITED STATES 113, S. CT. 1980, 124 l. Ed. 2d 21, 61 U.S.L.W. 4468 P.9

5. BALDWIN COUNTY WELCOME CENTER v. BROWN 466 U.S. 147, 104 S. Ct. 1723, 80 L. Ed 196, 52 U.S.L.W. 3751 Rule 8(f). P.9

6. HUGHES v. ROWE ET AL 449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163, 49 U.S.L.W. 3346 P.9

OPINIONS BELOW

The Lower Court dismissed the action pursuant to FRCP rule 41(b) "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against it".

The opinion of the United States Court of Appeals appears as Appendix A to the petition.

Interlocutory orders, opinions, memoranda, etc., appear in appendices B through J to the petition.

The final order of the United States District Court appears as Appendix K to the petition.

JURISDICTION

The Date of the decision of the U.S. Court of Appeals is filed January 4, 2002.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

HAINES v. KERNER, ET AL. 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 652 "Pro Se complaints are to be held to a less stringent standard than formal pleadings drafted by lawyers"

WILLIAM MCNEIL, PETITIONER v. UNITED STATES 113 S. Ct. 1980 124 L. Ed 2d 21m 61 U.S.L.W. 4468 "in the long run, experience teaches that strict adherence to procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)

STATEMENT OF THE CASE

A. Facts and circumstances related to the proceedings:

1. On August 12, 1999 respondent was served with a summons to U.S.D.C.

2. Since the respondent is a citizen of Connecticut and the petitioner was a citizen of New York at the time of filing, diversity of citizenship applied.

3. On or about November 15, 1999 petitioner relocated to Florida. Two weeks later petitioner submitted a change of address to U. S. Postal Service and to the U.S. D. C. clerk's office in NY.

4. On August 2, 2000, The Court Magistrate recommended dismissal with prejudice for failure to prosecute, for reasons that the petitioner had failed to appear for a Pretrial Conference on 1/31/00 and 06/21/00. In opposition papers to dismiss, petitioner stated that he had never received any notice whatsoever about pretrial conferences. In a teleconference on 04/04/01 the Magistrate stated he never got mail returned of the notices he allegedly sent to petitioner.

5. On September 15, 2000, the Court granted petitioner's motion not to dismiss. Petitioner averred he intended to proceed with the prosecution of the case.

6. Complete discovery was to be completed by 12/15/00.

7. On October 16, 2000, A Notice of Deposition and Production of Documents was sent to respondent.

8. On October 25, 2000 a Document Request was sent to the U.S. Immigration and Naturalization Services (USINS). USINS failed to respond.

9. On 11/15/2000 deposition of respondent was taken.

10. On 12/20/00 an extension for discovery was granted.

11. On January 10, 2001 a Notice of Deposition was sent to USINS General Counsel. This notice, as the previous went ignored.

12. On February 21, 2001 a Subpoena to USINS to produce documents was served upon the USINS. As in the two previous requests to USINS, this request was also ignored.

13. On March 12, 2001, the Court denied plaintiff's request to Compel Production of Documents to USINS, with reason that the discovery period had expired.

14. On April 04, 2001 now Court issues order to show cause why case should not be dismissed for lack of prosecution.

15. On April 24, 2001 Court requests a pretrial order to be filed no later than April 30, 2001.

16. On May 01, 2001 Court orders that plaintiff provide a draft of the pretrial order and then for the filing of a completed pretrial order by May 11, 2001. Respondent unaware of a new filing date filed a pretrial order on April 30, 2000.

17. Petitioner submitted pretrial order on May 08, 2001.

18. On May 14, 2001, petitioner is ordered to show cause why case should not be dismissed for deliberately and knowingly failing to comply with the May 01, 2001 order.

19. Petitioner submitted opposition to dismiss documents on May 21, 2001. This Opposition to dismiss does not appear on the Court Docket and apparently was ignored by the Court.

20. On May 23, 2001 Court issues a *sua ponte* order dismissing the case with prejudice.

REASONS FOR GRANTING WRIT

1. Petitioner is a pro se non - attorney litigant.

2. Respondent is a New York State registered attorney represented by counsel.

3. All rulings and orders of the Court were performed sua ponte. An obvious prejudice and bias against a pro se litigant continually surfaced during the proceedings in this matter. In the teleconference held on 04/04/01 the Magistrate spent more than 75% of the time discrediting and berating petitioner for not knowing what a pretrial order meant. The remaining 25% of the time the Magistrate spent giving reasons to the petitioner why it was okay for the respondent counsel not to produce documents at his deposition, even though record shows he was in possession of such.

Additionally, the petitioner told the Magistrate that he had sent a copy of the respondent's

deposition to respondent counsel for review and verification on December 06, 2000 and it had not been returned to petitioner by 04/05/01. Respondent counsel told the Magistrate that respondent was too sick to be bothered with such matters. The Magistrate failed to tell respondent counsel that a review and verification must be returned within thirty days. When the deposition was returned on April 18, 2001, it in fact was signed by the respondent on January 16, 2001. Defendant counsel either misled the Magistrate or backdated the signature on the deposition, all insignificant facts when brought to the courts attention. Here the Court lowers the standard for the Bar as it raises the standard for the pro se litigant.

Furthermore, orders and *sua sponte* rulings from the Court used the phrase "pretrial order" and "joint pretrial order" interchangeably. There was a total lack of clarification as to which phrase was to be applied and why they were both used to denote the same purpose.

Moreover, the Court failed to take the opportunity to fashion a pretrial order and any Final Pretrial Conference that could have been called by the court and attended by both parties. The Court dismissed under FRCP rule 41(b). The Court is not rendering its decision on the merits of the action. "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against it". The respondent counsel made no

move for dismissal. The Court, all along seeing how far it could mislead and addle the pro se petitioner while extending a free hand to the attorney defendant and defendant counsel opted to dismiss with prejudice at its own discretion.

Pursuant to FRCP rule 61 "...the Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In all of the above instances the Court failed to apply numerous Pro Se Laws: to wit,

In HAINES v. KERNER, ET AL 404 U.S. 519, 92 S. Ct 594, 30 L. Ed. 2d 652. "We cannot say with assurance that under the allegations of the pro se complaint which we hold to less stringent standard than formal pleadings drafted by lawyers" Conley v. Gibson, 355 U.S. 41, 45-46 (1957) See Dioguardi v. Durning, 139 F 2d 774 (CA2 1944).

In ESTELLE, CORRECTIONS DIRECTOR, ET AL v. GAMBLE 29 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251. "As the Court unanimously held in Haines v. Kerner, 404 U.S. 519 (1972), a pro se complaint, "however inartfully pleaded" must be held to "less stringent standards than formal pleading drafted by lawyers"

To illustrate that lawyers pleading cases should be held to as high a standards as pro se standards, as was not done in this action by the Court ignoring respondent's counsel failure to provide certification of respondent's

deposition within prescribed time and ignoring misrepresentations thereof by respondent counsel: WILLIAM MCNEIL, PETITIONER v. UNITED STATES 113 S. Ct. 1980, 124 L. Ed. 2d 21, 61 U.S.L.W. 4468 "In the long run strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law" Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980).

Again, a pro se pleadings are to be liberally interpreted in BALDWIN COUNTY WELCOME CENTER v. BROWN 466 U.S. 147, 104 S. Ct 1723, 80 L. Ed 2d 196, 52 U.S.L.W. 3751 Rule 8(f) provides that "pleadings shall be so construed as to do substantial justice." We frequently have stated that pro se pleading are to be given liberal construction.

Lastly, in HUGHES v. ROWE ET AL. 449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163, 49 U.S.L.W. 3346. "It is settled law that the allegation of such a complaint, "however artfully pleaded, are held to "less stringent standards than formal pleadings drafted by lawyers".

The facts of this action and the demeanor displayed and applied by the Court and its magistrate to the petitioner fails to comply with the manner and custom commonly afforded to Pro Se litigants as mandated by the above rulings. Indeed the attorney respondent had the benefit of the Court and Magistrate do all of his lawyering for him while raising to unreasonable heights its Pro Se standards.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari be issued.

Respectfully Submitted
Richard C. Herbst
Dated April 04, 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the united States Courthouse, Foley Square, in the city of New York, on the 4th day of January, Two Thousand Two.

PRESENT: HONORABLE James L. Oakes,
HONORABLE Jon O. Newman,
HONORABLE Fred I. Parker,
Circuit Judges.

RICHARD C. HERBST v. MICHAEL A. O. BROWN Case No. 01-7771

For Appellant: Richard C. Herbst, Pro Se, West Palm Beach, Fl
For Appellee: Jonathan Marks, Law Office of Jonathan Marks, New York, NY

APPENDIX A

Herbst v. Brown
Docket No. 01-7771

Appeal from the United States District Court for the Southern District of New York (Lewis A. Kaplan, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said district court be and it hereby is AFFIRMED.

Appellant-plaintiff Richard C. Herbst appeals from the judgment of the United States District Court for the Southern District of New York (Lewis A. Kaplan, Judge), entered May 23, 2001, dismissing Herbst's complaint with prejudice for failure to comply with various court orders. We hold that the district court did not abuse its discretion in dismissing plaintiff's complaint. For substantially the same reasons as set forth by the district court in its order, the judgment of the district court is AFFIRMED.

SEAL: UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED Jan 4 2002

For the Court,
Roseann B. MacKechnie, Clerk

By: Lucille Carr

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

ORDER

Lewis A. Kaplan, *District Judge*

Jurisdiction in this case purportedly is based on diversity of citizenship. The complaint, however, does not allege the citizenship of the parties, as it alleges only the states of their residence. Accordingly, plaintiff shall serve and file an amended complaint showing the existence of subject matter jurisdiction no later than 14 days after the date of this order, failing which the action will be dismissed.

SO ORDERED.

Dated August 26, 1999

Lewis A. Kaplan
United States District Judge

Copies mailed 8/27/99
Chambers of Judge Kaplan

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

REPORT AND RECOMMENDATION
To the HONORABLE LEWIS A. KAPLAN, U.S.D.J.

This is a *pro se* action for breach of contract. Plaintiff filed the complaint on August 10, 1999. This matter was referred to the undersigned for general pretrial purposes on November 10, 1999. For the reason stated below, I recommend that plaintiff's complaint be **DISMISSED WITH PREJUDICE** {bold original} pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute.

On January 31, 2000, the plaintiff failed to appear at a noticed pretrial conference. However, the plaintiff did send a change of address to the Court, received in the Pro Se Office on February 3, 2000, and docketed with the records department on February 28, 2000. On February 2, 2000, the Court ordered plaintiff to Show Cause on or before February 16, 2000, why this case should not be dismissed for failure to prosecute. Because it was not clear whether plaintiff received the Show Cause Order, the Court scheduled another pretrial conference for June 21, 2000, and sent notice to the changed address on May 2, 2000. Again, the plaintiff failed to appear. Moreover, the plaintiff has never contacted the Court to explain his absence or to further his

case in any way. Finally the plaintiff has not conducted any discovery or otherwise taken steps to prepare the case for trial.

Plaintiff is responsible for insuring that his case will proceed without delay. It is incumbent upon plaintiff to keep counsel and the Court apprised of his whereabouts. Failure to communicate or cooperate with counsel is incompatible with the plaintiff's obligation before the Court.

Having found that Herbst has failed to prosecute his case, the Court recommends that his complaint be **DISMISSED WITH PREJUDICE** (original) for failure to prosecute.

Pursuant to Rule 72, Federal Rules of Civil Procedure, the parties shall have ten (10) days after being served with a copy of the recommended disposition to file written objections to the Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable Lewis A. Kaplan, 500 Pearl Street, Room 1310, and to the chambers of the undersigned, Room 1970. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. **See Thomas v. Arn**, 474 U.S. 140, 150 (1985); **Small v. Secretary of Health and Human Services**, 892 F2d 15, 16 (2d Cir. 1989) (*per curiam*); 28 U.S.C. § 636(b)(1) (West Supp. 1995); Fed. R. Civ. P. 72, 6(a), 6(e).

APPENDIX C

DATED: July 31, 2000
New York, New York

Respectfully Submitted,

The Honorable Ronald L. Ellis

United States Magistrate Judge

Copies of this Report and Recommendation were sent to:

Plaintiff:

Richard C. Herbst, 931 Village Blvd., Suite 905-122, West Palm Beach, Fl 33409

Defendant:

Jonathan Marks, Law Office of Jonathan Marks, 350 Fifth Avenue, Suite 7912, New York, NY 10118

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

OPPOSITION TO DISMISS

1. Plaintiff is Pro Se and in receipt of the Court's Magistrate recommendation to dismiss with prejudice the above captioned action.
2. This recommendation was received by the plaintiff on August 10, 2000
3. The recommendation states that "plaintiff failed to appear."
4. Plaintiff has never, never received any notice by the court to appear.
5. Plaintiff had to relocate because of the actions of the respondent.
6. Relocation to Florida consumed a considerable time and expense taking away time from litigation pending in New York.
7. As the recommendation states, an address change was sent to the Clerk of the Court who apparently took 28 days to post it.
8. Nevertheless, nothing has been received by the plaintiff except this recent recommendation to dismiss with prejudice for failure to prosecute.
9. Now that the relocation aspect has been thoroughly settled and achieved, the plaintiff, Pro Se, had and continues to have the intent to zealously prosecute the above captioned action.

RELIEF REQUESTED

9. Upon the pleading, exhibits and affidavits submitted heretofore and herein, the plaintiff respectfully requests the court not dismiss the complaint or in the alternate not to dismiss the complaint with prejudice.

Dated: August 14, 2000
West Palm Beach, Fl

Richard C. Herbst
Suite 905-122
931 Village Blvd.
West Palm Beach, Fl 33409

TO: Honorable Lewis Kaplan
U.S. District Court
New York, NY 10007

Clerk of the Court

Jonathan Marks
350 Fifth Avenue
Suite 7912 New York, NY 10018

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

ORDER

Lewis A. Kaplan, *District Judge*

By report and recommendation dated July 31, 2000, Magistrate Judge Ellis recommended that this action be dismissed with prejudice based on plaintiff's repeated failures to appear or respond to court directions or to take any steps to prosecute the action. Plaintiff objects on the ground that he never received any notice of anything from the Court prior to the report and recommendation and that he intends to prosecute the action vigorously.

The Court will give plaintiff the benefit of the doubt. Accordingly, the Court will not now dismiss the action as recommended. Nonetheless, the parties are directed to complete discovery on or before December 15, 2000 and to file a joint pretrial order and any motions for summary judgment on or before December 31, 2000.

SO ORDERED.
Dated September 14, 2000

Lewis A. Kaplan
United States District Judge

Copies mailed 9/15/00
Chambers of Judge Kaplan

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

The parties having failed to file the pretrial order as required by prior order of the Court, it is hereby

ORDERED that the parties show cause, on or before April 23, 2001, why this action should not be dismissed for lack of prosecution.

Dated April 4, 2001

Lewis A. Kaplan
United States District Judge

Copies mailed 4/4/01
Chambers of Judge Kaplan

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

MEMORANDUM
OPINION & ORDER
RONALD L. ELLIS, United States Magistrate Judge

Pro Se plaintiff initiated this action, alleging breach of contract, breach of duty, larceny, and personal injury, on August 10, 1999. On July 31, 2000, this Court recommended this case be dismissed for plaintiff's failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. ***See*** Report and Recommendation, 99 Civ. 8792, July 31, 2000(U.S.M.J. Ellis). Plaintiff opposed the recommendation on the grounds that he had not received notice of conference. On September 15, 2000, District Judge Kaplan declined to dismiss the case and directed parties to complete discovery by December 15, 2000, and to submit a joint pretrial order and any motions for summary judgment on or by December 31, 2000. Order, 99 Civ. 8792, December 15, 2000(U.S.D.J. Kaplan). He then extended the deadline for completion of discovery to February 15, 2001. Order, 99 Civ 8792, December 19, 2000 (U.S.D.J. Kaplan).

On March 12, 2001, plaintiff submitted a document styled, "Petition for Pre-Trial Order to

Compel Production of Documents"("Petition"),[1] in which plaintiff requested the Court to compel production of certain documents by the Immigration and Naturalization Service ("I.N.S."). Plaintiff complained that his discovery requests had gone unheeded and that the general counsel of the I.N.S. failed to respond to his notice of deposition. ***See*** **Id.**, Exh. D. Parties did not submit a pretrial motion, as ordered by Judge Kaplan.

Plaintiff has failed to secure jurisdiction over the I.N.S. as a non-party to this case. His discovery requests are flawed in two respects. First, the subpoena requesting production of documents in West Palm Beach, Florida, was issued by the wrong court. A subpoena must be issued *by the court for the district in which the production is to be made.* Fed. R. Civ. P. 45(a)(2). Plaintiff's subpoena was issued by the United States District Court for the Southern District of New York – not the appropriate federal court in Florida. ***See*** Petition, Exh. E. Second, plaintiff's notice of deposition lacked an accompanying subpoena to compel the non-party witness to appear. Such subpoenas must also be issued by a court in the district where the deposition is to be taken. See Fed. R. Civ. P 45(a)(2).

Plaintiff's motion to compel is hereby **DENIED**, and **IT IS ORDERED** that the parties shall submit a joint pretrial order to Judge Kaplan's chambers by April 30, 2001.

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[1] Plaintiff indicated to the Court that he believed this submission complied with the requirements of a "pretrial order" in Judge Kaplan's Order.

APPENDIX G

SO ORDERED this 9th day of April 2001
New York, New York

The Honorable Ronald L. Ellis
United States Magistrate Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

ORDER

Lewis A. Kaplan, *District Judge*

The order to show cause, dated April 4, 2001, is discharged. The pretrial order, as directed by Magistrate Judge Ellis, shall be filed no later than April 30, 2001. Failure to do so may result in case dispositive sanctions.

SO ORDERED.

Dated April 24, 2001

Lewis A. Kaplan
United States District Judge

Copies mailed 4/25/01
Chambers of Judge Kaplan

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

ORDER

Lewis A. Kaplan, *District Judge*

Plaintiff has filed a document entitled Request Prior to Pretrial Order Recusal in which he seeks to have the Court "discontinue the services of [Magistrate} Judge Ellis," issue a court-ordered subpoena to the INS, and extend the date for filing the pretrial order.

The application is denied in all respects. Plaintiff has shown no legally sufficient ground for seeking disqualification of Judge Ellis, an application which in any case in the first instance should have been made to Judge Ellis. The Court will not issue a court-ordered subpoena to the INS, as the period for discovery has concluded. Finally, the plaintiff has had more than one previous extension of the time for filing the pretrial order. No sufficient basis is shown for any further extension. Among other things, plaintiff has made no effort to demonstrate what discovery he thinks he needs from the INS, when he first sought it, and whether he has pursued it diligently.

The burden is on the plaintiff to provide a draft of the pretrial order conforming to my individual practices, which are available from the Clerk's Office, to defense counsel and then

for filing the completed pretrial order. That should have been done already. If the completed joint pretrial order is not filed on or before May 11, 2001, the Court may dismiss the action if the failure is attributable to the plaintiff and may strike the defendant" answer and enter judgment by default if the failure is attributable to the defendant.

SO ORDERED.

Dated: May 1, 2001

Lewis A. Kaplan
United States District Judge

Copies mailed 5/1/01
Chambers of Judge Kaplan

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

ORDER

Lewis A. Kaplan, *District Judge*

On July 31. 2000, Magistrate Judge Ellis recommended that this action be dismissed based on plaintiff's repeated failures to appear or respond to court directions. The undersigned gave the plaintiff the benefit of the doubt and directed that discovery be completed by December 15, 2000 and a joint pretrial order filed by December 31, 2000. Those deadlines were not met.

Subsequently, the Court extended the date for filing of the pretrial order until March 15, 2001. That date too was missed and the Court on April 4, 2001 issued an order to show cause why the action should not be dismissed, although it discharged the order ***upon learning*** (emphasis added) that Magistrate Judge Ellis had extended the time for filing the pretrial order until April 30, 2001.

By order dated May 1, 2001, the Court *sua sponte* extended the time for filing the pretrial order until May 11, 2001. The order stated:

" The burden is on the plaintiff to provide a draft of the pretrial order conforming to my individual practices, which are available from

the Clerk's Office, to defense counsel and then for filing the completed pretrial order. * * * If the completed joint pretrial order is not filed on or before May 11, 2001, the Court may dismiss the action if the failure is attributable to the plaintiff and may strike the defendant's answer and enter judgment by default if the failure is attributable to the defendant."

On May 8, 2001, plaintiff submitted to the Court a so-called separate pretrial order, justifying his action by stating that "there never was any conference to discuss disputes, issues or remedies applicable to pretrial order of the court." Implicit, of course, is the fact that plaintiff did not provide a draft of the pretrial order to defense counsel notwithstanding the Court's express advice that it was his burden to do so. Plaintiff thus gives every indication of continuing to prosecute this case according to his personal desires, irrespective of the directions of the Court and the rules of procedure.

In all the circumstances, plaintiff is directed to show cause, on or before May 24, 2001, why this action should not be dismissed on the ground that plaintiff deliberately and knowingly has failed to comply with the May 1, 2001 order and failed to cooperate in the process of preparing a joint pretrial order.

SO ORDERED.
Dated May 14, 2001

Lewis A. Kaplan
United States District Judge

Copies mailed 5/14/01
Chambers of Judge Kaplan

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Short title: HERBST v BROWN
Docket #: 99 CIV. 8792 (LAK)

ORDER

Lewis A. Kaplan, *District Judge*

Magistrate Judge Ellis directed the filing of a joint pretrial order on April 30, 2001. On April 24, 2001, this Court confirmed that order and warned that failure to comply might result in case dispositive sanctions. Nevertheless, the parties did not comply. Instead, plaintiff sought to have the Court disqualify Judge Ellis, to order certain discovery, and to extend the time for filing the pretrial order. By order dated May 1, 2001, the Court denied the discovery and recusal application but extended the time within which to file the joint pretrial order until May 11. Moreover it directed plaintiff to provide the defendant with a draft of the pretrial order and again warned that the failure to submit a joint pretrial order by that date could result in dispositive sanctions for any party responsible.

Instead of doing what he had been directed to do, plaintiff submitted to the Court his own unilateral version of a pretrial order, a course he sought to justify by stating that "there never was any conference to discuss disputes, issues or remedies applicable to pretrial order of the Court." Defendant did the same, noting that plaintiff had notified the court that he does not intend to contribute to a joint pretrial order.

APPENDIX K

By order dated May 14, 2001, the Court noted that plaintiff seems determined "to prosecute the case according to his personal desires, irrespective of the directions of the Court and rules of procedure" and directed him to show cause, on or before May 24, 2001, why the action should not be dismissed for failure to comply with the May 1 order and to cooperate in the process of preparing a joint pretrial order. Plaintiff has responded by attempting to blame defense counsel for lack of progress in this litigation and for allegedly having assumed that plaintiff would not file a pretrial order. But plaintiff tacitly acknowledges that he (1) never sent a draft pretrial order to the defendant's counsel, as he was directed to do, and (2) made no effort to cooperate with defendant's counsel in formulating a joint pretrial order as required.

Dismissal under Rule 41(b) requires a finding of wilfulness (sic), bad faith or fault on the part of the plaintiff. See *Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759 (2d Cir. 1990): *Salahuddin v. Harris*, 782 F.2d 1127, 1132 (2d Cir. 1986). Moreover, dismissal should be ordered only after consideration of (1) the duration of the plaintiff's failure to comply with court orders, (2) the extent of plaintiff's notices that failure to comply would result in dismissal, (3) whether defendant is likely to be prejudiced by further delay, (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in being heard, and (5) whether a lesser sanction might be effective. See *Shannon v. General Elec. Co.* 186 F.3d 186, 193 (2d Cir. 1999).

Here, plaintiff has failed to cooperate in formulating a joint pretrial order since at least the middle of March.. He has been on notice at least since May 1, 2001 that he was obliged to provide the defendant's counsel with a draft of the pretrial order in sufficient time to permit filing with the extended period allowed. He has know since at least April 24 that failure to make timely filing of the joint pretrial order might result in case dispositive sanctions, a warning that was reiterated in even more specific terms on May 1. The case is already almost two years old and would have been disposed of long ago had plaintiff cooperated. Moreover, the defendant, a former employee of the plaintiff in an immigration assistance business, appears to be in no position to engage in protracted litigation, the cost and duration of which is constantly increased by plaintiff's behavior. Nor is there any reason why plaintiff should be permitted to demand a disproportionate share of the time and efforts of a judge and a magistrate judge, to the prejudice of other litigants, by insisting upon proceeding when, as, and if the spirit moves him.

This is not the first time that the Court has considered imposing case dispositive sanctions upon the plaintiff. In a report and recommendation dated July 31, 2000, Magistrate Judge Ellis recommended dismissal of the action based on plaintiff's repeated failures to appear at pretrial conferences, his failure to attempt to explain or justify his absences, and his failure to take any steps to prepare the case for trial. The Court rejected that recommendation, expressly giving plaintiff

the benefit of the doubt, in order to preserve his right to a disposition on the merits. But plaintiff's wilful (sic) and deliberate failure to comply with the May 1 order demonstrates that he has abused the opportunity thus provided, and he is not entitled to another given the lack of any indication that he would behave properly in the future or that lesser sanctions would produce the desired result. After all, plaintiff nearly had his case dismissed a year ago and then proceeded to ignore the Court's requirement despite explicit warning that this action could result in its dismissal.

Accordingly, the action is dismissed with prejudice based on plaintiff's violation of the May 1, 2001 order.

SO ORDERED.

Dated May 23, 2001

Lewis A. Kaplan
United States District Judge

Copies mailed 5/23/01
Chambers of Judge Kaplan